other LECs, while claiming to explain why Dr. Brock's calculations are incorrectly low, do not even attempt to develop their own cost figures or place those cost figures in the record.[94/] The Commission cannot accept any of the LEC estimates as a preferable cost proxy to 0.20 cents. Moreover, as Cox explained in its comments, 0.20 cents is a number so low that the cost of measuring and charge for the exchange of traffic is likely to approach or even exceed 0.20 cents per minute, thereby offsetting the net amount to virtually zero and making bill and keep an appropriate and economically efficient interim compensation method.[95/]

While several LECs offer unsubstantiated numbers as alternatives to 0.20 of a cent, none are based on any documentation placed in this record and they are not acceptable proxies for actual interconnection costs. They plainly are not preferable to an interim bill and keep arrangement that will reset the LEC incentives to place realistic incremental cost figures on the table as a basis for long term interconnection where traffic is greatly out of balance.

93/ (...continued)
be above incremental cost in order to provide LECs with the opportunity to recover all costs.").

94/ See, e.g., U S West Comments Attachment A, A Response to Dr. Gerald Brock at 12-14. See also Bell Atlantic Comments Attachment 1 (stating Bell Atlantic's current CMRS and interexchange carrier interconnection rates).

95/ Cox Comments at 17. Adopting a compensation model that requires extensive measurement and settlement of co-carrier costs is economically inefficient when reducing de minimis LEC costs by administrative, regulatory and CMRS network costs will lead to a zero or even negative cost result.

The only other proxy number the FCC might consider would be interim figures adopted by several states in landline competition interconnection proceedings.[96/] While there may be some facial attractiveness to the notion of using one of the figures adopted by the states as a cost proxy, it is essential that any figure adopted by the FCC plainly represent only forward looking incremental costs and not any "contribution" to common costs, joint costs or LEC overheads. No state has yet developed such a proxy figure.[97/]

The alternative arrangements proposed by the LECs are completely unsuitable for LEC-to-CMRS interconnection. Several LECs, for instance, suggest the Commission should adopt "Ramsey pricing" to allocate shared costs and overhead to interconnection.[98/] "Ramsey pricing" is an inverse elasticity principle where most of shared costs and overhead is allocated to services where demand is inelastic, or, in non-economic terms, where competition does not exist. If "Ramsey pricing" were adopted for interconnection, CMRS providers and other interconnectors who are captive users of interconnection would have to pay huge portions of LEC shared costs and overhead. By inflating the price of

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96/ See Maryland Order at 32; Illinois Bell Telephone Company, Order, State of Illinois Commerce Commission, Docket No. 94-0096 (released April 7, 1995) at 98 ("Illinois Order").

97/ Those few states that have adopted cost proxies have permitted LECs to recover some "contribution" from landline interconnectors. Maryland Order at 31-32 ("we believe it is appropriate to set interconnection rates at levels that allow carriers to recover their direct, joint and common costs"); Illinois Order at 98 (interconnection rates should be based "upon the actual LRSIC costs which Illinois Bell would incur in providing termination services" plus provide for "a reasonable level of contribution to Illinois Bell's overhead costs").

98/ PacBell Comments at 46-48. See also Bell Atlantic Comments, Statement of Robert W. Crandall on Interconnection Policies for CMRS at 4-5.

interconnection the LECs thus would prevent competitors from offering local loop service, a result that is efficient and in the public interest only from a LEC's warped perspective. While the Commission should jump-start competition by the prompt adoption of interim bill and keep, if the Commission instead decides to adopt cost-based rates, those rates cannot and should not include any shared costs or overhead. This conclusion is, of course, consistent with both the relevant pricing signal in the TCA and Hausman's view of economic efficiency when he testified for a cellular operator in Massachusetts.[99]

Another LEC alternative, application of the efficient component pricing rule ("ECPR"), is similarly infirm. ECPR allows for the recovery of costs above marginal cost based on the "opportunity cost" of selling an unbundled input.[100] "Opportunity cost" in economic literature commonly refers to the revenue foregone by a party when it chooses Option A instead of Option B. In a monopoly context like interconnection, however, "opportunity cost" is more than just the cost of choosing a different option, it includes the profit lost when a former monopolist sells an input to a competitor. Adoption of ECPR would, therefore, allow the LECs to assess interconnection fees that include the profits the LECs have lost because CMRS providers are now offering a competing service. For a

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99/ See, e.g., SBC Comments Attachment A, Testimony of Jerry A. Hausman on Behalf of Cellular One, Commonwealth of Massachusetts Department of Public Utilities, D.P.U. 94-185, May 1995 at 5, 7 ("To promote economic efficiency, network interconnection rates should be set at long-run incremental (marginal costs). . . . The Department should indicate its support for the principles of reciprocal compensation and interconnection based on incremental costs.").

100/ See, e.g., GTE Comments at 34. See also MECA Comments at 10-14.

CMRS provider to be successful under an ECPR interconnection policy, the CMRS provider would have to charge its customers a price high enough to cover its own costs, LEC costs and all LEC profits the LEC would have made if the CMRS provider had not tried to offer a competing service. Plainly, if the CMRS provider must cover all costs including LEC profits, the CMRS provider will not be able to pass the benefits of competition on to consumers in the form of lower prices. ECPR is nothing more than another LEC attempt to appear supportive of competition in general while protecting its profits using anticompetitive pricing theories.

B. Implementation of Compensation Arrangements.

1. Negotiations and Tariffing.

a. If an Interim Bill and Keep Interconnection Compensation Method Is Adopted, Negotiated Contracts Are Sufficient to Govern the Remaining Issues of LEC-to-CMRS Interconnection.

As discussed above, the comments show that an interim bill and keep interconnection compensation method should govern LEC-to-CMRS interconnection at all meet points because it is administratively efficient and will best promote competition. If bill and keep is adopted as Cox proposes, the major stumbling block for LEC and CMRS provider interconnection negotiations, compensation, will be eliminated.[101/] With the compensation issue removed, LECs and CMRS providers should be able to quickly and successfully

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101/ While Cox urges the Commission to adopt bill and keep, if the Commission adopts any mandatory interconnection rate the parties will not need to negotiate compensation.

negotiate the other technical aspects of interconnection that are specific to each CMRS provider, such as appropriate meet points, thus making tariffs unnecessary.[102/] Cox agrees with those parties that favor the public filing of all LEC-to-CMRS interconnection agreements at the Commission,[103/] and agrees that business-sensitive information should be redacted.[104/] Once a contract is on file, any similarly situated CMRS provider should be able to obtain the same contract terms.

While Cox supports negotiation, it does not agree with the LEC commenters that assert that the TCA requires negotiation of all interconnection arrangements, including the appropriate compensation for traffic termination.[105/] As discussed in the next section, the 1993 Budget Act allows the Commission to establish a separate regulatory regime for CMRS providers consistent with, but outside of, the statutory negotiation process prescribed in the TCA. Congress intended for CMRS to be regulated on the national level, and the 1993 Budget Act authorized the Commission to regulate CMRS in the manner that best promotes

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102/ As Cox stated in its initial comments, an interim bill and keep framework should be applied not only to LEC end office connections, but also tandem interconnections. It would be up to the individual carriers to negotiate to determine appropriate network meet points.

103/ See, e.g., PCIA Comments at 12; Celpage Comments at 9; Arch Comments at 18.

104/ AirTouch Comments at 41; Arch Comments at 18; AT&T Comments at 19; 360° Comments at 7; PCIA Comments at 14.

105/ See, e.g., NYNEX Comments at 7; U S West Comments at 28-29; USTA Comments at 7.

competition. The 1993 Budget Act gives the Commission the authority to require the filing of contracts for LEC-to-CMRS interconnection through its authority over CMRS rates.[106/]

Further, the TCA does nothing to protect as sacrosanct existing LEC-CMRS interconnection agreements, as claimed by PacBell.[107/] The Commission's authority to abrogate existing carrier contracts as the public interest requires is well established.[108/] Once the Commission acts to finalize its tentative conclusion that current imbalanced negotiated arrangements fail to promote competition, LECs will be bound to take all necessary actions consistent with the FCC's determinations, including withdrawing state interconnection tariffs or renegotiating existing contracts. Particularly since CMRS stands on a different jurisdictional footing than landline, PacBell has failed to prove that Congress intended to "grandfather" existing CMRS interconnection agreements. Any LEC claims that their existing agreements deserve any type of regulatory "protection" are unfounded and should be dismissed.

106/ Under this framework the FCC has the authority to prescribe a rate -- either zero or another rate -- to be reflected in carrier-to-carrier contracts.

107/ PacBell Comments at 96-97.

108/ See, e.g., Expanded Interconnection with Local Telephone Company Facilities, Memorandum Opinion and Order, 9 FCC Rcd 5154, 5207-5210 (1994) (discussing the Commission's "fresh look" policy for LEC special access customers following the availability of expanded interconnection on remand from the D.C. Circuit and concluding that the policy is necessary); Amendment of the Commission's Rules Relative to Allocation of 849-851/894-896 MHz Bands, Memorandum Opinion and Order, 6 FCC Rcd 4582, 4583-84 (1991) (provisions in GTE Airfone's existing contracts are found to be contrary to the public interest and therefore will no longer be enforced).

b. Regardless of the Method of Agreement Adopted, The Status Quo on LEC-to-CMRS Interconnection Must Change.

Regardless of whether negotiated contracts or tariffs are used, the status quo in LEC-to-CMRS interconnection must change. LEC claims that negotiation "has worked well in the past" and that wireless providers have been "happy" with the interconnection agreements negotiated to date[109/] are absurd, as the comments show.[110/] Contrary to the claims of several LECs, the "past success and phenomenal growth" of CMRS providers over the last several years has been in spite of, not because of, the current uneconomic LEC-to-CMRS interconnection arrangements.[111/] As Cox explained in its Comments, CMRS providers to date have not seriously challenged the LEC wireline local loop due in no small part to LEC success in relegating cellular to a niche service.[112/] Because CMRS providers are now attempting to enter the market for local telecommunications services, however, the price input of interconnection will be critical to their continued success.

Cox, for example, has consistently stated its intention to compete with PacBell in California for local loop customers. Cox has a broadband PCS license in Southern California and Nevada, and has been attempting to "negotiate" with PacBell for PCS

109/ See, e.g., Ameritech Comments at 3; Bell Atlantic Comments at 9; Cincinnati Bell Comments at 2.

110/ See, e.g., Centennial Comments at 17; Arch Comments at 17; MCI Comments at 11.

111/ See GTE Comments at 41.

112/ Cox Comments at 12-13.

interconnection in California since early last year. As the Commission was informed last August, when Cox inquired about interconnection terms in California, PacBell merely referred Cox to its pending intrastate cellular interconnection tariff.[113] More recently, PacBell shared a copy of its interconnection agreement with its PCS affiliate, PacBell Mobile Systems, only after Cox signed a nondisclosure agreement. In its Comments in this proceeding, however, PacBell characterizes CMRS interconnection as a "long-standing" contract-based pricing negotiation which will begin again shortly, with new contracts to be in place when PacBell's existing contracts expire in April of 1997 -- a matter purely of PacBell's own administrative convenience.[114]

Indeed, Cox's experience in attempting to "negotiate" an interconnection agreement with PacBell stands in sharp contrast to the claims of PacBell's expert Hausman that under the current framework, negotiation, rather than regulation, leads to an agreement that "makes both parties better off."[115] Common sense dictates that when one party holds all the bargaining power, as the LECs currently do with their control over essential bottleneck facilities, negotiations are not likely to yield the "economically efficient solution." Under the current framework, the party with bargaining power will dictate the "mutually agreeable"

113/ See Pacific Bell, Nevada Bell, Pacific Bell Mobile Services and Pacific Telesis Mobile Services' Plan of Non-Structural Safeguards Against Cross-Subsidy and Discrimination, Comments of Cox Enterprises, Inc., GN Docket No. 90-314 (filed August 16, 1995) at 40.

114/ PacBell Comments at 6-7; 90-91.

115/ PacBell Comments at 88.

negotiated terms to the party without bargaining power. Because this scenario has proven true thus far, the Commission must create new incentives for the LECs to agree to the economically efficient mutual exchange of traffic. It can do this by adopting an interim bill and keep and by setting the correct, long run incremental cost pricing standards to govern the longer term LEC-to-CMRS interconnection negotiation process. If these two steps are taken, as they should be, the Commission's role will likely be a minor one because LECs and CMRS providers will need to resolve only a minimum number of issues related to network meet points.

2. The FCC Possesses the Legal Authority to Mandate Specific LEC-CMRS Interconnection Policies.

In an attempt to obscure the plain meaning of the 1993 Budget Act, incumbent LECs and state regulatory commissions have argued that: (1) the 1993 Budget Act does not grant the FCC plenary jurisdiction over LEC-to-CMRS interconnection rates;[116/] and (2) the TCA reserves the ability to regulate "intrastate" mutual compensation arrangements to the states.[117/] Simply put, these parties have misinterpreted the impact of the 1993 Budget Act and the TCA on federal and state jurisdiction over CMRS interconnection.

116/ See, e.g., NYDPS Comments at 13-15; CTDPUC Comments at 2-5; PacBell Comments at 97-99; U S West Comments at 61-62.

117/ See, e.g., GTE Comments at 42-43; NARUC Comments at 4-6; PacBell Comments at 92-93.

a. The 1993 Budget Act Preempted State Regulation of LEC-to-CMRS Interconnection.

The 1993 Budget Act granted the Commission the authority to require interim bill and keep mutual compensation for the exchange of traffic between CMRS providers and LECs. The FCC's jurisdiction is firmly rooted in 1993 Budget Act amendments to Section 2(b), the FCC's general authority under Section 201 of the Communications Act to require common carriers to "establish physical connections with other common carriers," and its specific authority under Section 332(c)(1)(B) to "order a common carrier to establish physical connections" with a CMRS provider under Section 332(c)(1)(B) of the Budget Act. FCC jurisdiction over rates charged for LEC-to-CMRS interconnection also is supported by Section 332(c)(3) and substantiated by TCA provisions that expressly preserve the framework established in 1993 for the regulation of CMRS.

(1) The 1993 Amendments Eliminated State Substantive Jurisdiction over Wireless Common Carrier Services.

A number of commenters argue that the 1993 Budget Act does not grant the FCC authority to mandate bill and keep reciprocal compensation for the exchange and termination of traffic between LECs and CMRS providers.[118/] These commenters misunderstand the 1993 Budget Act amendments -- unaffected by the TCA -- which fundamentally altered the nature of CMRS regulation to reflect the uniquely interstate aspects of the service.

118/ See NYDPS Comments at 13-15; CTDPUC Comments at 2-5; PacBell Comments at 97-99; U S West Comments at 61-62.

First, these commenters fail to address the import of the 1993 Budget Act's amendment to Section 2(b) of the Communications Act. While Section 2(b) traditionally reserves to the states authority over "charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communication service," Congress in the 1993 Budget Act altered FCC authority by excepting CMRS from Section 2(b)'s jurisdictional limitations.[119/] By so doing, Congress made clear that the federal-state dichotomy that "fenced off" intrastate matters from federal jurisdiction would no longer apply to CMRS.[120/] This amendment to Section 2(b) is particularly significant because Section 2(a) grants the FCC extremely broad powers that are limited only by Section 2(b). Without Section 2(b), there would be few meaningful limits on the FCC's ability to displace state authority.[121/]

119/ The 1993 Budget Act conference report confirms that the amendment to Section 2(b) was intended to clarify that the "Commission has the authority to regulate commercial mobile services." See Conf. Rep. No. 103-213, 103 Cong., 1st, Sess. 494, 497 (1993) ("Conference Report").

120/ The extent to which the modification to Section 2(b) removes limitations on federal jurisdiction over LEC-to-CMRS interconnection is confirmed by reference to the other subject areas specifically excepted in Section 2(b). Indeed, the FCC enjoys enhanced authority to regulate pole attachments, TRS requirements and telemarketing, regardless of "interstate" or "intrastate" classifications. In fact, these "exceptions" were legislated specifically to remove an apparent contradiction between the substantive provisions that expanded FCC authority and the general prohibition against FCC regulation of purely intrastate wireline and radio services.

121/ Exempting CMRS from the jurisdictional impact of Section 2(b) eliminated any limitation on the FCC's authority to adopt a bill and keep mutual compensation model for LEC-to-CMRS interconnection. See Louisiana PSC, 476 U.S. 355, 374 (1986) (observing that "a federal agency may preempt state law . . . when . . . it is acting within the scope of its congressionally delegated authority"). As such, the scope of Commission authority over CMRS, including LEC-to-CMRS interconnection rates, reverts to the amplitude of

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Thus, the Congressional determination that Section 2(b) should not apply to matters within the scope of Section 332 greatly expanded the FCC's power to regulate CMRS.

The express terms of Section 332(c)(1)(B) confirm that CMRS has been deliberately brought within the FCC's exclusive jurisdiction. Section 332(c)(1)(B) states that:

> Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this Act. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this Act.[122/]

Significantly, this provision does not distinguish between the FCC's authority to mandate the terms of interconnection for the provision of "intrastate" or "interstate" CMRS. Consequently, the FCC is granted authority to order all common carriers to establish physical connections with CMRS providers upon request, regardless of the intrastate or interstate nature of the carriers' service offerings.[123/] Further, Section 201(b) expressly authorizes the

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121/ (...continued)
pre-Section 2(b), as set forth in Houston, E. & W.T.R. Co. v. United States, 234 U.S. 342 ("Shreveport Rate Case") (interpreting predecessor provision of Section 2(a) in authorizing legislation for the Interstate Commerce Commission). This authority embraces all matters having such a "close and substantial relation to interstate traffic that [] control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance." See Shreveport Rate Case, 234 U.S. at 351.

122/ See 47 U.S.C. § 332(c)(1)(B).

123/ Some commenters suggest that Section 332(c)(1)(B) does not permit the FCC to adopt interconnection rules because it permits the FCC only to respond to requests from CMRS providers. See, e.g., USTA Comments at 17; Ameritech Comments at 11. This cramped view of the FCC's authority is incorrect. The "[u]pon reasonable request" language
(continued...)

FCC to regulate interconnection charges to ensure that the rates charged for interconnection are just and reasonable.[124/]

Section 332(c)(1)(B) makes plain that the FCC's authority under Section 201 is expanded to include authority to act in response to any CMRS provider's request for interconnection. While the duty to provide interconnection under Section 201(a) extends only to common carriers "engaged in interstate or foreign communications," Section 332(c)(1)(B) expands this federally-mandated duty to all CMRS carriers, including CMRS carriers engaged in the provision of intrastate telecommunications services.[125/] Arguments that Section 201 "has never been thought to trump state rate making authority under Section

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123/ (...continued)
of Section 332(c)(1)(B) parallels similar language in Section 201, which never has been held to limit the FCC's power to adopt rules governing interconnection. Even if Section 332(c)(1)(B) did require an adjudicatory approach to interconnection requests, there can be no doubt of the Commission's power to adopt substantive rules governing those adjudications. As the Supreme Court established nearly fifty years ago, "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." SEC v. Chenery Corp., 332 U.S. 194, 203 (1947); see also NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

124/ In the relevant part, 47 U.S.C. § 201(b) states:

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful. . . .

See 47 U.S.C. § 201(b).

125/ See Section 332(c)(1)(B); see also H.Rep. No. 103-111, 103 Cong., 66, Sess. (1993) ("House Report") at 261 ("Nothing here shall be construed to expand or limit the Commission's authority under Section 201, except as this paragraph provides.").

152(b)" ignore completely Section 332(c)(1)(B)'s impact on the FCC's Section 201 interconnection authority.[126/] Indeed, because Section 201 of the Communications Act already grants the FCC jurisdiction over interstate communications, the changes wrought in Section 332(c)(1)(B) must have expanded the FCC's interconnection jurisdiction to include authority over intrastate CMRS communications.[127/]

Adopting the jurisdictional interpretations of the LECs or the state commissions participating in this proceeding would require the FCC to ignore the 1993 Budget Act's statutory amendments and view the statute as effecting no change in the regulation of CMRS interconnection. The complete failure of parties opposing FCC jurisdiction over LEC-to-CMRS interconnection to explain why the FCC should ignore these statutory provisions and disclaim the jurisdiction that Congress intended to vest in the agency provides further evidence that the Commission has the power to act.[128/]

126/ See Ex Parte Letter from Michael Kellogg, Attorney for Bell Atlantic Corporation and Pacific Telesis Group, to William Caton, Acting Secretary, Federal Communications Commission at 5 (dated Feb. 26, 1996) ("Kellogg Letter"); see also NYDPS Comments at 14.

127/ Parties that argue that Section 332(c)(1)(B) did not expand the Commission's authority fail to explain why it was adopted in the first place. See PacBell Comments at 98-100 (claiming that to the extent that prior law allowed states to regulate interconnection rates, Section 332(c)(1)(B) changes nothing). The parties also ignore the basic statutory construction principle that requires giving effect to all parts of a statute. See infra nn. 164, 165.

128/ Even parties that concede that Section 332(c)(1)(B) governs LEC-to-CMRS interconnection ignore its impact on federal interconnection authority -- presumably because there can be no other interpretation in light of explicit statutory language to the contrary. See Kellogg Letter at 5.

The Commission's authority to regulate LEC-to-CMRS interconnections rates and policies is reinforced by Section 332(c)(3) of the 1993 Budget Act, which preempts state authority over "rate and entry" regulation of CMRS. Parties opposing the exercise of Commission jurisdiction over LEC-to-CMRS interconnection rates argue that Section 332(c)(3) applies only to end user rates, not to rates charged by LECs for CMRS interconnection.[129/] These arguments, however, are unsupported by the terms of the 1993 Budget Act and, if adopted, would create a regulatory structure for CMRS that cannot practically be maintained -- much less one capable of achieving the FCC's competitive goals for CMRS.

As discussed above, the 1993 Budget Act amended Section 2(b) and Section 332 to remove the bar on federal regulation of "charges . . . for or in connection with intrastate communications service . . . by radio." Consequently, federal jurisdiction over CMRS rates under both Sections 332(c)(3) and 201 now includes not only end user rates but also charges imposed "for and in connection" with the delivery of CMRS service. Because LEC interconnection rates and policies are critical to the provision of CMRS, it is logical that Congress vested the FCC with complete authority to regulate LEC-to-CMRS interconnection rates and to ensure that LEC interconnection policies do not bar entry into the CMRS marketplace.[130/]

129/ See, e.g., CTDPUC Comments at 17-18; PUCO Comments at 4.

130/ This interpretation is supported by Section 253(e) of the TCA which provides (continued...)

Moreover, by preempting state rate and entry authority over CMRS, Section 332(c)(3) empowers the FCC to "occupy the field" of CMRS regulation. In Louisiana PSC, the Supreme Court stated that "the critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law."[131/] If a federal statute expressly authorizes an administrative agency to preempt state regulation, then the administrative agency necessarily is vested with jurisdiction to regulate the underlying subject matter that the statute authorizes the agency to preempt. In this instance, federal regulation of CMRS is limited only by reference to a narrowly crafted class of "other terms and conditions."[132/] The FCC, therefore, retains jurisdiction to ensure that terms and conditions of interconnection between LECs and CMRS providers are just, reasonable and non-discriminatory.[133/]

Contrary interpretations of the 1993 Budget Act in some parties' comments defy logic and, if accepted, would establish an unworkable paradigm for CMRS regulation. A number of parties, for instance, argue that CMRS charges for interconnection and termination of

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130/ (...continued)
that "[n]othing in this section shall affect the application of section 332(c)(3) to commercial mobile service providers." Placing this clause in a section of the statute that addresses "barriers to entry" confirms that section 322(c)(3) implicates more than merely end user rates.

131/ See Louisiana PSC, 476 U.S. at 369.

132/ In preserving state authority over "terms and conditions" of CMRS, the 1993 Budget Act refers to "such matters as customer billing information and practices and billing disputes and other consumer protection matters." See House Report at 261.

133/ See 47 U.S.C. §§ 151, 154(i) and 201.

traffic are exempt from state regulation while LEC charges for interconnection and termination of traffic are subject to state regulation.[134] It would be incongruous, however, for the FCC to have exclusive jurisdiction over the interconnection charges charged by a CMRS provider but not over LEC interconnection rates. A rational interpretation of 332(c)(3) leads to the conclusion that the FCC can regulate LEC-to-CMRS interconnection rates; otherwise, each jurisdiction would have authority over only one half of the same transaction. This would frustrate Congress' intent to create a network of networks; it also would be administratively and economically inefficient. The inseverability of what is essentially a single transaction has been confirmed by at least one LEC's concession that its CMRS interconnection rates are purportedly set to include compensation to the CMRS provider for its termination of LEC traffic.[135]

Further, the interconnection rates charged by LECs to terminate CMRS traffic inevitably must be passed on to CMRS customers in the form of higher rates. Consequently, it would be absurd to give the FCC oversight powers for interconnection rates charged by CMRS providers while permitting the states to regulate the "LEC" portion of the

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134/ See, e.g., CRA Comments at 7, 9; U S West Comments at 60-61.

135/ See PacBell Comments at 79 (bilateral interconnection negotiations lead to charge from LEC for interconnection and no charge from CMRS provider); see also USTA Comments at 5 ("Rather, LECs and CMRS providers may negotiate mutually acceptable terms whereby the LEC compensates the CMRS provider for terminating LEC-originated traffic through a reduction in the rate it would otherwise charge the CMRS provider for terminating CMRS-originated traffic."). One indication of the power LECs have in these negotiations is that CMRS providers invariably pay both to originate and terminate calls.

interconnection rate. By permitting LECs to charge highly inflated interconnection rates to CMRS providers, for example, a state could indirectly set CMRS subscribers' rates at a level that make it uneconomic for the CMRS provider to enter the market and offer competitive telecommunications services.[136/] The price and terms of interconnection thus are so crucial to the provision of CMRS that permitting inconsistent and varied regulation of LEC interconnection rates and compensation policies would permit by indirection what the states are prohibited from doing directly -- effectively regulating the entry and rates of CMRS providers. Indeed, it is impossible to permit separate state regulation of the LEC interconnection rates without violating the Section 332(c)(3)(A) prohibition on state regulation of CMRS rates and entry.

(2) State Regulation of the LEC Portion of LEC-to-CMRS Interconnection Rates is Fundamentally Inconsistent with the Statutory Goal of a Nationwide CMRS Market.

As demonstrated above, Congress vested all LEC-CMRS interconnection authority with the FCC when it amended Section 2(b) of the Communications Act to exclude Section 332 from the realm of the bifurcated federal-state authority over traditional wireline common carriage. The legislative history of the 1993 Budget Act confirms that Congress' intent in amending the regulatory structure for CMRS was to ensure the development of nationwide wireless systems. Commenters claiming that Congress did not "federalize" the regulation of

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136/ Indeed, that is the practical effect of 3 cent per minute interconnection charges, which effectively prevent CMRS providers from offering the flat rate services typical of the residential telephony marketplace.

CMRS ignore Congressional pronouncements demonstrating that CMRS is inherently "interstate" in nature and subject only to federal regulation. The record also shows that states have repeatedly interfered with the federal interest in promoting the rapid deployment of wireless networks nationwide.

Congress was unequivocal in stating that Section 332 was intended to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."[137/] An intent to vest the Commission with exclusive jurisdiction over intrastate CMRS rate and entry regulation is evidenced by this view of CMRS as jurisdictionally interstate, operating "without regard to state lines." Similarly, in adopting the Senate's amendment of Section 2(b) to reserve exclusive jurisdiction over CMRS matters, the full Committee explained that:

> [t]he Senate Amendment of Section 2(b) contains a technical amendment to Section 2(b) of the Communications Act to clarify that the Commission has authority to regulate <u>commercial mobile services</u>.[138/]

This language also plainly reflects Congress' intent to give the FCC jurisdiction over CMRS rates and entry without regard to their intrastate nature.

Finally, Congress stated that it "considers the right to interconnect an important one and one which <u>the Commission</u> shall seek to promote, since interconnection serves to

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<u>137/</u> <u>House Report</u> at 260.

<u>138/</u> <u>See</u> <u>Conference Report</u> at 497 (emphasis added).

enhance competition and advance a seamless national network."[139] To advance this principle, Congress specifically vested the FCC with jurisdiction to order common carriers to establish interconnection with CMRS providers upon reasonable request, thereby expanding the FCC's jurisdiction under Section 201.[140] Subjecting LEC and CMRS interconnection rates and policies to divergent, uncoordinated state regulation would undermine the congressional intent to create a network of networks. Moreover, permitting states to impose compensation arrangements for LECs that differ from the FCC mechanism for CMRS would negate the federal policy favoring a nationwide wireless network.

In defense of the status quo, both LECs and various states have sought to mislead the Commission by claiming that the record does not support federal intervention in the regulation of LEC-to CMRS interconnection.[141] The record, however, is filled with examples of direct state interference with pro-competitive CMRS interconnection policies and arrangements, as well as instances where states have permitted the imposition of intrastate interconnection rates that far exceed the costs of providing interconnection to CMRS operators.[142]

139/ House Report at 261 (emphasis added).

140/ Id. at 261.

141/ See NARUC Comments at 9; BellSouth Comments at 33; CRA Comments at 13-16; PUCO Comments at 5.

142/ See e.g., GTE Comments at 21 ("Although the FCC mandated mutual compensation for interstate interconnection, many existing rate structures at the state level inhibit or restrict LECs from negotiating mutual compensation arrangements with wireless

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In Connecticut, for example, the Department of Public Utility Control ("DPUC") recently prohibited the incumbent local exchange carrier from entering into reciprocal compensation agreements with wireless carriers.[143/] A CMRS provider operating in Connecticut can receive mutual compensation from the local telephone company only if it seeks state certification as a Certified Local Exchange Carriers ("CLEC"). Moreover, lest the FCC believe that state regulation would not be a burden on CMRS providers, Connecticut law would require the CMRS provider to, among other requirements, comply with state-specific technical and operations requirements and offer a specific basic telecommunication services option as defined by state law.[144/] These requirements would be forced upon the CMRS operator as the quid pro quo of mutual compensation, regardless of whether federal mandates would dictate less stringent regulation.

Similarly, while CMRS providers in California are not explicitly barred from receiving mutual compensation from the LEC, eligibility for mutual compensation is dependent on the service provider's willingness to seek certification as a competitive local

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142/ (...continued)
carriers.").

143/ See State of Connecticut Department of Public Utility Control, DPUC Investigation into Wireless Mutual Compensation Plans, Decision, Docket No. 95-04-04, at 15 (September 22, 1995) ("Connecticut Order") ("[T]he Department will not authorize SNET to enter into mutual compensation agreements with [wireless] carriers.").

144/ See Connecticut Order at 15.

carrier.[145] To achieve equal treatment, CMRS providers must submit to extensive entry and rate regulation, which includes tariff and contract filing requirements, prior notification requirements and various state approvals, e.g. to discontinue service.[146]

In addition to the lack of mutual compensation, states regularly permit LECs to charge higher rates for CMRS interconnection than rates charged for competitive LEC interconnection. In New York, for example, wireless providers pay an average of 2.6 cents per minute, while competitive LECs pay a penny per minute for intrastate interconnection.[147] In addition, not unlike Connecticut, to receive the benefit of the lower intercarrier interconnection rate, wireless carriers in New York must meet state-imposed entry and rate eligibility criteria.[148]

Conditioning the availability of pro-competitive CMRS interconnection policies on the regulatory agendas of state commissions is exactly what Congress sought to avoid in granting the FCC jurisdiction over CMRS in the 1993 Budget Act. These examples of the intrusive

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145/ See California Public Utilities Commission, Competition for Local Exchange Service, D.95-07-054, R.95-04-044, at 38-39 (July 24, 1995).

146/ Although the CPUC recognizes its lack of jurisdiction over CMRS rates and entry, its certification rules do not explicitly exempt wireless providers from state-imposed preconditions to becoming a competitive local carrier. Id. at 23.

147/ See AT&T Comments at 27.

148/ These include, among other things, compliance with certain state tariffing requirements, contribution to the statewide relay access system and compliance with New York's Open Network Architecture principles and service quality standards. See New York State Department of Public Service, The Level Playing Field, An Interim Report, Case 94-C-0095, 74-75 (February 15, 1995).

nature of state regulation of LEC-to-CMRS interconnection provide more than an adequate basis for immediate and comprehensive federal action.

(3) Prior Commission Decisions Do Not Bar a Holding That the Commission Maintains Jurisdiction Over CMRS Interconnection.

Various commenters argue that Section 332 did not federalize CMRS interconnection because prior Commission decisions would have to be overturned. Review of those decisions, however, confirms that they have no effect on the Commission's power to determine in this proceeding that it has jurisdiction over the terms and conditions of CMRS interconnection.

First, certain parties contend that the Commission's statement in the CMRS Second Report and Order that "revised Section 332 does not extend the Commission's jurisdiction to the regulation of local CMRS rates" would have to be overruled.[149/] That issue is, of course, the subject of pending reconsideration of the CMRS Second Report and Order. Thus, it is not a final order and has no precedential effect in the current proceeding.[150/]

149/ See Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411, 1480 (1994) ("CMRS Second Report and Order"); see, e.g., CPUC Comments at 18; BellSouth Comments at 32-33.

150/ Moreover, the CMRS Second Report and Order also confirms that state and local regulation of the kind of interconnection to which CMRS providers are entitled is preempted. CMRS Second Report and Order at 1498 ("The Commission further finds that separate interconnection arrangements for interstate and intrastate commercial mobile radio services are not feasible (i.e., intrastate and interstate interconnection in this context is inseverable) and that state regulation of the right and type of interconnection would negate the important federal purpose of ensuring CMRS interconnection to the interstate network.").
(continued...)

Second, others claim that the Commission has concluded that Section 332(c)(3)(A) covers only rates charged by CMRS providers to subscribers, not LEC-to-CMRS interconnection agreements.[151] While these parties may cite the FCC's Louisiana decision as granting authority to state regulators, the Commission actually denied the Louisiana Commission's petition to retain regulatory authority. Moreover, the order itself makes it plain that it is not intended to be the Commission's final word on the subject of jurisdiction, describing its "comment" on Louisiana's regulatory authority as "preliminary," saying that it "appears" the Louisiana Commission may have certain powers, and inviting parties to seek reconsideration on any specific regulations they believe should be preempted.[152] The Louisiana decision also does not address the Commission's power under Section 332(c)(1), and the Commission has explicitly invited comment on whether to reconsider that decision in this very proceeding.[153]

150/ (...continued)
Accordingly, the extent of FCC jurisdiction over LEC-to-CMRS interconnection matters remains unresolved.

151/ See Ex Parte Letter from Michael Kellogg, Attorney for Bell Atlantic Corporation and Pacific Telesis Group, to William Caton, Acting Secretary, Federal Communications Commission at 8 (dated March 13, 1996) ("2nd Kellogg Letter") (citing Report and Order, Petition on Behalf of the Louisiana Public Serv. Comm'n for Authority to Retain Existing Jurisdiction Over Commercial Mobile Radio Services Offered Within the State of Louisiana, 10 FCC Rcd 7898, 7908 (1995) ("Louisiana decision"); see also CTDPUC Comments at 5-7.

152/ Louisiana decision at 7907-7908.

153/ Notice at ¶ 112 (specifically soliciting comments on inseverability of interconnection rate regulation).

A number of parties also cite the FCC's 1987 declaratory ruling for the proposition that LEC-to-CMRS interconnection rates are severable.[154] They fail to explain, however, how a ruling issued six years before the amendment of Sections 2(b) and 332 can resolve current issues of FCC jurisdiction over CMRS interconnection. In addition, they ignore almost a decade of advancements in cellular technologies that affect the applicability and accuracy of the analysis. Thus, none of these decisions affects the Commission's ability to adopt the jurisdictional analysis mandated by the 1993 Budget Act and described herein.

b. The Commission's Jurisdiction Over LEC-to-CMRS Interconnection Is Undisturbed by the Interconnection Provisions of the TCA.

A number of parties argue that the TCA creates a new model for interconnection that eviscerates the regulatory framework established for CMRS in the 1993 Budget Act.[155] These arguments disregard provisions of the TCA that expressly preserve the regulatory structure for CMRS established by Congress less than three years ago. Indeed, a review of the interconnection provisions of the TCA demonstrates that the FCC's exclusive jurisdiction over LEC-to-CMRS interconnection, granted by the 1993 Budget Act, is left undisturbed.

In adopting Sections 251 and 252 of the TCA, Congress carefully crafted provisions intended to ensure, at a minimum, just, reasonable and non-discriminatory interconnection

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154/ See The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Declaratory Ruling, 2 FCC Rcd 2910, 2912 (1987).

155/ See PacBell Comments at 92; GTE Comments at 42-43 ("Now that the 1996 Act has become law, the question whether Section 332(c) preempts state regulation of LEC-CMRS interconnection is largely beside the point."); BellSouth Comments at 32.